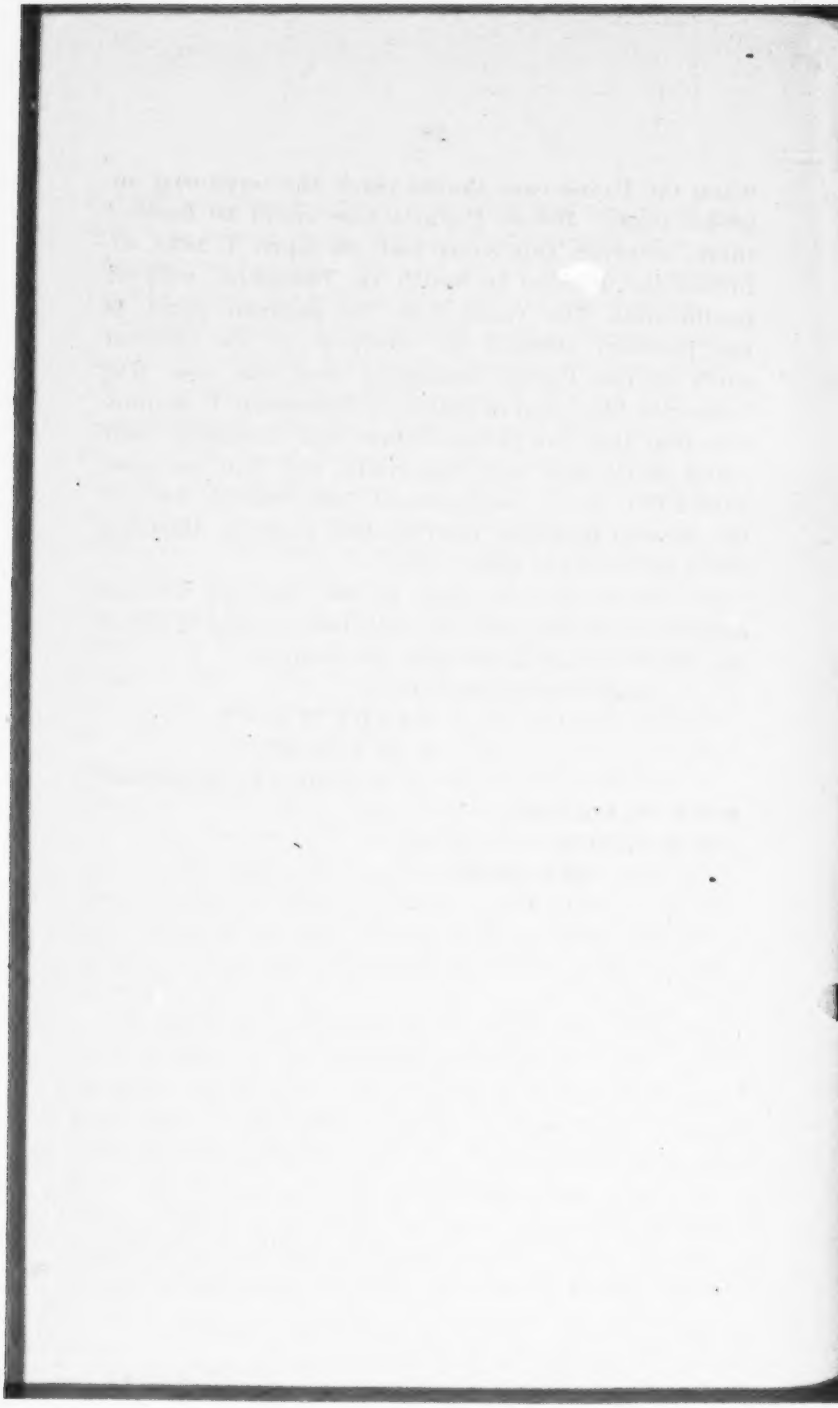

No. 20.

Reply Brf. of Luckett for Ap

Office Supreme Court U. S.
FILED
JAN 22 1898
JAMES H. McKENNEY
Clerk

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Filed Jan. 22, 1898.

RANSOM PAYNE,
Appellant,
vs.
W. S. ROBERTSON *et al.*,
Appellees.
No. 20.

APPELLANT'S BRIEF IN REPLY TO BRIEFS OF APPELLEES.

HENRY N. COPP,
S. D. LUCKETT,
Att'ys for Appellant.

BYRON S. ADAMS, PRINTER.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

RANSOM PAYNE,
Appellant,
vs.
W. S. ROBERTSON *et al.*,
Appellees.
No. 20.

APPELLANT'S REPLY TO BRIEFS FOR APPELLEES.

Three briefs have been filed by appellees, in at least two of which certain points are sought to be raised which were not presented by them in the Oklahoma Supreme Court and which are not discussed, therefore, in appellant's original brief. It is necessary for us to examine these points with some care. Each of the briefs is signed by the Solicitor General, but as two of them are signed by Mr. Horace Speed and one by Mr. Bayard T. Hainer, we shall, in referring to them, designate them as Mr. Hainer's brief, Mr. Speed's reply brief and Mr. Speed's brief, respectively.

I.

Reply to Points Made in Answer to Appellant's Brief.

Before noting the new questions sought to be raised by appellees we notice a few points made in response to our original argument.

In Mr. Hainer's brief (p. 6) and in Mr. Speed's brief (pp. 5, 6, 7 and 13) it is contended, more or less explicitly, that appellant is seeking to control the action of the townsite trustees in the administration of their trust and in the discharge of their duties as trustees, under the discretionary and semi-judicial powers given them by the Oklahoma townsite act of May 14, 1890 (26 Stat., 109). This shows an entire misapprehension of appellant's ground of action. He is not seeking to have the trustees directed or controlled in the discharge of their trust, but on the contrary, is attacking the trust directly, and is asking a decree to the effect that the Secretary of the Interior erred in construing the law as to *appellant's* prior claim to this same land under the homestead law and that because of appellant's superior rights the title to this land should be declared to be in him and not in the appellees as trustees for the townsite occupants. We are seeking, in other words, to have a court of equity declare that the Secretary of the Interior erred in conveying this land in trust to these appellees and their successors because the land had been previously appropriated under the homestead law by appellant and was not subject to townsite entry. If appellant had no legal entry, then he has no interest in the land and does not seek to control the action of the trustees in discharging their trust. This is not, as stated in Mr. Speed's brief (top of page 7), "the same sort of attempt" that was made in the case of McDaid *vs.* Oklahoma, *ex rel.* Smith (150 U. S., 209). What we have just said indicates the distinction between that case and the case at bar. In that case an effort *was* made to control the trustees in the exercise of their powers and the discharge of their duties *as trustees* and compel them, by writ of mandamus, to convey a town lot to one of two conflicting claimants. Both parties were claiming under the trust. This is no such case. Payne is resisting the trust.

The attempt to apply the case of Litchfield *vs.* Register and Receiver (9 Wall., 575) and similar cases, to this one shows, also, a failure to understand the theory of appellant's case. In that case a proceeding was brought to enjoin the register and receiver of a local land office from entertaining and allowing a certain pre-emption application. As was said by the Court, the local officers had no interest in the land and *did not represent* the claimants. In Oklahoma townsites, made under the act of May 14, 1890, *supra*, the trustees do represent the occupants of lots. They hold the title in trust for such occupants and are required to convey the lots to the occupants after having identified them. Their relation to the title and to the occupants of the townsite is precisely the same as that of a county judge or the municipal authorities of an incorporated town, in a townsite made under Secs. 2387, 2388, and 2389, U. S. R S. The procedure, however, in the two classes of cases is different. In a townsite under the general statute the trustee administers his trust under rules and regulations prescribed by his State or Territorial legislature. In an Oklahoma townsite the trust is precisely the same, but it is administered under rules and regulations prescribed by the Secretary of the Interior, subject to the right of successive appeals to the Commissioner of the General Land Office and the Secretary himself.

That these trustees represent the townsite settlers is expressly held by the Secretary of the Interior. In Brummett *vs.* McCordia Townsite (24 L. D., 468), Secretary Bliss held, (quoting syllabus):

"On the application of townsite trustees to make a townsite entry a charge of abandonment, as against the townsite settlers, may be properly entertained, and notice to said trustees of the hearing ordered is notice to lot claimants."

The case of Gonzales *vs.* French (164 U. S., 338) was as much like the case at bar as the McDaid case, *supra*, was not

like it. There Mrs. Gonzales sued the probate judge, acting as trustee for the townsite of Flagstaff, Ariz., under the general townsite law, to have her alleged superior claim to the land, under the pre-emption law, recognized and enforced. The case was determined on its merits as between herself, on the one hand, and the probate judge, representing the townsite claimants, on the other.

On page 11 of Mr. Speed's reply brief, he asserts that Payne's petition is without merit, that he claims the court "should give him a tract of land where *now* is a living town of thousands of people on the ground that he got *first* to the land, 'began to dig a hole,' and next day filed on the land." The cases he cites, on that and following pages, have no bearing on the case before the Court and we do not stop to discuss them. The sophistry of the suggestion is apparent upon the face of the language used. The gentleman says there is *now* a town on the land but that Payne was there *first*. This is true and it is, also, true that just because he was there first and initiated a homestead claim to the land by settlement, before it was occupied as a townsite, gave notice diligently and faithfully to all comers that he had taken that homestead and made his entry of record promptly, the succeeding day, although under Section 3 of the act of May 14, 1880 (21 Stats., 140), he would have had three months in which to perfect his entry, Payne had a statutory right to the land superior to all later settlers, if he was qualified. In the case of Kingfisher *vs.* Wood and Fossett (11 L. D., 330), Secretary Noble had before him precisely the same kind of case as the one at bar, so far as the question of the relative rights acquired by a homestead settlement, on one hand and a later townsite occupation of the land, on the other hand, are concerned. In that case he held:

In considering the case of Fossett, as he was the first settler upon the land, and his settlement was followed by resi-

dence and improvement, whatever rights he may have acquired were properly held by your office to have attached at the time of his actual settlement, and not on the following day, when he made his claim of record at the local office. His rights cannot, therefore, be impaired by the subsequent occupation, on the same day, of the land embraced in his entry by the townsite settlers.

Inasmuch as neither the courts nor the Department has ever made a ruling to the contrary, the above is a sufficient answer to the contention of counsel.

It is also said that Payne should be left to his remedy at law, and on page 14 of Mr. Speed's reply brief the suggestion is made that he should sue parties occupying the land in ejectment. This was certainly made by inadvertence. Payne has no remedy at law. He cannot sue in ejectment, for he does not hold and cannot obtain the legal title. His sole remedy is at equity, to have the courts review the action of the Interior Department in canceling his homestead entry and obtain a decree, if possible, finding error of law on the part of the Secretary and declaring Payne the equitable owner of the land. The very cases cited by Mr. Speed in his other brief (p. 6) conclusively establish this proposition, and we ask to adopt them as our authorities.

II.

What Questions Are Before the Court.

In the briefs for appellees counsel attempt to raise the following questions:

1. That Payne's action was brought on the territorial side of the district court and not in the court sitting as a United States District Court, and, therefore, that the court had no jurisdiction of the defendants. (Mr. Speed's brief, p. 7.)

2. That there is a defect of parties. (Mr. Hainer's brief, p. 7; Mr. Speed's brief, pp. 8, 9.)

3. That the suit was premature, the legal title being still in the United States. (Mr. Hainer's brief, p. 4.)

4. That the suit has abated because the defendants are no longer in office. (Mr. Hainer's brief, p. 8.)

5. That Payne was disqualified as a homestead claimant because of the alleged speculative character of his entry. (Mr. Speed's reply brief, p. 8; Mr. Hainer's brief, p. 9.)

None of the above propositions were raised in the Supreme Court of the Territory. They were not passed upon by that court. They are not raised by our appeal. Hence, they are not before this Court for decision.

The demurrer filed by appellees, defendants below, in the district court (p. 19, *et seq.* of Record), specifies five grounds of objection to the "complaint," but in the "note" thereto, signed, "Horace Speed, U. S. Att'y," the only point pressed upon the attention of the court was Payne's supposed disqualification, because of "soonerism," arising under the fourth ground of demurrer, viz; that the complaint "does not state cause sufficient to constitute a cause of action."

In our original brief, beginning at page 14, we quoted at length from the written opinion of the trial judge, filed in the case, from which it appears that this one ground of disqualification was the only question considered by him.

In the specifications of error in the appeal to the Oklahoma Supreme Court (Record, pp. 24, 25), the specific errors alleged all relate to the one question.

The appellees, Robertson *et al.*, filed a simple "Joinder in error," signed by Mr. Speed, in the Territorial Supreme Court, in which they allege "that there is no error in the proceedings in the court below." (Record, p. 26.) The case was submitted in the Supreme Court, "on the transcript of the record and errors therein assigned, without argument and *without the filing of briefs.*" (Record, p. 26, bottom of page.)

The opinion of the Supreme Court has been certified in the record (p. 27). There, it is said:

"A demurrer was interposed in the court below, raising the question of the qualification of appellant as a homestead entryman, under the act of Congress of March 2, 1889, and was sustained to appellant's bill of complaint," etc.

This Court will look into the opinion of the court from which a case is brought for the purpose of ascertaining what questions were decided by the lower court.

> Fire Association *vs.* New York (119 U. S., 110), and cases there cited.

As a rule this Court will not pass upon questions that were not presented to the court whose decision it is sought to have reversed.

> McDonald *vs.* Smalley, 1 Pet., 620;
> Bradstreet *vs.* Potter, 16 Pet., 317;
> Bell *vs.* Bruen, 1 How., 169, 187;
> U. S. *vs.* Bank of U. S., 5 How., 382, 395;
> San Pedro, &c., Co. *vs.* U. S., 146 U. S., 120.

This rule is peculiarly applicable to cases coming here through an intermediate appellate court, and was expressly applied, in the case last cited, to an appeal in an equity case from the Supreme Court of a territory. In that case objection had been made by the defendant in the district court to certain depositions which objection was overruled. The decision of the case, in the trial court, was for the defendant. The United States appealed to the Territorial Supreme Court which reversed the decision. The question of the admissibility of this testimony was not raised in the Territorial Supreme Court, but was sought to be raised again in this Court. The right to do this was denied; the Court, in the opinion by Mr. Justice Brewer, saying:

"But our inquiry is limited to the rulings of the Supreme Court of the Territory; it is its judgment which we are re-

viewing. By the appeal the case was transferred as a whole from the district court to the Supreme Court. The rulings of the former court did not bind or become those of the latter, either as to the admission or rejection of testimony, or the decree to be entered. All the testimony taken and filed in the one court was spread before the other, and was apparently proper for its consideration. If the defendant had wished to narrow the examination of that court to any portion of the testimony it should be by appropriate motion to it have challenged the supposed objectionable parts."

So, in the case at bar, where Payne's appeal had removed the whole record to the Supreme Court below, counsel for appellees failed to renew their demurrer or in any manner to invoke a ruling by the court on the questions now raised by them and allowed the Supreme Court to pass upon and affirm the decision of the district court on the one question of qualification. They cannot, now, be heard, by what is practically a motion to dismiss or affirm, to raise questions they did not submit to the Supreme Court below for decision.

This rule will, we are quite sure, be so far applied, at least, that this Court will first determine whether or not there was error committed by the court in its decision on Payne's disqualification, the question being raised directly by our appeal.

We enter our objection, on this ground, to the consideration of the five propositions of the appellees enumerated above, but it is only fair to say that as to the fourth point mentioned by us, viz, the alleged abatement of the suit, the facts on which that is based are alleged to have occurred since the decision of this case in the Supreme Court below.

III.

The Suit Properly Brought.

There is no real merit in any of the counter propositions made by counsel on the other side, aside from the failure to raise the question below.

Mr. Speed, alone, alleges that Payne's suit was brought on the territorial side of the district court, against officers of the United States, and that the court had no jurisdiction over the persons of defendants. The point scarcely deserves notice. It would be a sufficient answer to say that the defendants appeared in the court in which the suit was brought, by "Horace Speed, U. S. Attorney," the same gentleman who now seeks to raise the question, without objection then made. He cannot make it here for the first time.

But the record does not sustain the assertion. On the contrary, the judgment of the court on the demurrer (Record, p. 21) is entitled as follows:

"United States of America,
Territory of Oklahoma, } ss;

September Term, First Judicial District, Logan County, Number 898, *United States District Court.*"

IV.

No Defect of Parties.

It is contended that the trustees could not be sued alone, but that the supposed occupants of lots should have been joined. Indeed, counsel go so far as to say that the trustees are not even proper parties, much less necessary, and they say that we first sued the appellees as private individuals, but will probably now claim that we sue them as officers of the United States. This is another misapprehension of our case.

This suit, as we have already tried to show, was not against the defendants, as officers of the United States, for the purpose of controlling their official action in any respect. We doubt if they would be considered as *officers* of the United States under any proper definition of that term. In the McDaid case (150 U. S., 209, 219), *supra*, this Court aptly described them as "*agents* of the government." But neither do we sue these appellees in their capacity as agents of the government, for the purpose of having the Court control their action in the discharge of their agency.

On the other hand, the suit is not against Robertson *et al.* as private individuals. We have sued them as trustees of an express trust for the purpose of attacking and defeating the trust as a whole and of having plaintiff (appellant) declared the owner of the supposed trust property. In their capacity as agents of the Government, the Secretary of the Interior has caused this land to be conveyed to these parties, in trust for the occupants, the trust to be discharged under the Act of May 14, 1890, under regulations prescribed by the Secretary. They become, therefore, trustees primarily for the occupants and *sub modo* for the Government. (McDaid case, *supra.*) It is as such trustees that they are sued. Our action is against them in their representative capacity, and it was so understood by them and by the Department officials at the time. If not, why was the United States attorney for Oklahoma instructed to defend them in the lower courts, and why does the Attorney-General appear of record for them in this Court?

The point is made that the *cestuis que trust* should have been made parties, but who are they? Part of the duties imposed upon these trustees is to ascertain and identify the legal occupants of lots, hearing contests between conflicting claimants to the same lot, and awarding the same to the rightful claimant. They are to convey the lots to the par-

ties ascertained by them to be the legal occupants, and their action in awarding or refusing to award a lot to a particular individual is conclusive upon him unless reversed on appeal to the Commissioner or Secretary. This action was begun promptly upon the issuance of the patent to these trustees and before any deeds had been made by them, as is shown by the allegation in the complaint (Record, p. 8) that the trustees "are about to commence making deeds." This is conceded by counsel on the other side (Mr. Speed's brief, p. 15; Mr. Hainer's brief, p. 6). It is also conceded in Mr. Hainer's brief (p. 5), that among the objects for which this land was conveyed to the trustees "was the determination of the rightful claimants of the lots and the issuance of proper conveyance to them."

At the time this action was brought, then, the beneficiaries of the trust had not been identified. The trustees, alone, had the power to identify them. Under such circumstances it is not necessary to join them in an action against the trustees. Indeed, it is impossible to do so.

We concede the general rule to be that in suits in equity in reference to a trust estate, the trustee and *cestui que trust* are both to be joined, but there are important exceptions to this rule and the case at bar comes within the exceptions. The correct rule is laid down in Vetterlein *vs.* Barnes (124 U. S., 400), where the authorities are collected and the case of Sears *vs.* Hardy (120 Mass., 529), cited in Mr. Speed's brief (p. 8), is distinguished. The case at bar is not a suit to enforce the execution of the trust but to defeat it altogether, and is within the express language used by this Court in Vetterlein *vs.* Barnes, *supra*, where it is said:

"But the rule is different where the claim of the plaintiff antedates the creation of the trust and the suit is brought, not in recognition or furtherance of the trust but in hostility to it as fraudulent and void."

The rulings are so fully collected in the above case that it is unnecessary to cite farther authorities, but we refer to the following:

Perry on Trusts, Sec. 873;
Daniel's Chan. Prac., p. 222;
Beach Mod. Eq. Prac., Sec. 70;
Story's Eq. Pl. and Prac., Sec. 216;
Jewett *vs.* Tucker, 139 Mass., 566.

In addition to the above, it must be borne in mind that this case arose in Oklahoma Territory and that the statutes of the Territory, if there are any on the subject, govern in matters of procedure. By Section 3767 (p. 751) of the compiled Laws of Oklahoma (1893) it is provided:

"Except as herein otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustee, subject only to the execution of the trust and the beneficiaries take no estate or interest in the property but may enforce the trust."

For these reasons there was no defect of parties defendant.

V.

The Court had Jurisdiction of the Subject-Matter.

It is earnestly contended that the legal title to the land here involved was still in the United States, when this suit was brought, and that under the rule familiar to all, the courts have no jurisdiction over the title. It is admitted that the land had been patented to the townsite trustees, but it is contended that this patent did not end the jurisdiction of the executive department, and the case of McDaid *vs.* Oklahoma, *Ex rel.* Smith (150 U. S., 209), is confidently cited in support of the contention.

Of course, it is not denied by appellees that when the legal title is conveyed, a court of equity then has jurisdic-

tion to look into the proceedings in the Land Department with a view to ascertaining whether or not a mistake was made in rejecting a claim adverse to that of the patentee and enforcing the rights of the adverse claimant. We submit that, as between a homesteader whose claim was adverse to that of the townsite and the townsite trustees, the action of the Secretary in canceling the homestead entry and patenting the land to the trustees ended the jurisdiction of the Department for purposes of disposal. The land had then been disposed of for townsite uses. By section 6 of the act of May 14, 1890, it is provided that all townsite entries made under the provisions of the act shall be given preference over other business at the local office and shall be made special for adjudication in the General Land Office and the Department; that townsite applications filed prior to the passage of the act shall be prosecuted by the trustees appointed under its provisions, to final issue, and the section then proceeds—

"and when final entry is made, the *title of the United States* to the land covered by such entry *shall be conveyed to such trustees, for the uses and purposes herein provided.*"

The above language seems clear and unambiguous. The title of the United States is the legal title. This title is conveyed to the trustees, charged, of course, with a trust, and "for the uses and purposes" provided for by the act. But, thenceforward, all inquiries by any departmental tribunal into the merits of an adverse claim to the land are concluded. The Secretary could not entertain a homestead application for the land, on allegations of priority of right, nor could he entertain a contest against the town site entry, on charges of illegality, with a view to the cancellation of the patent. He has no more power to recall and cancel this patent than if it had been issued to Payne on his homestead entry.

By what title do occupants of lots hold after deeds have been made to them by the trustees? It certainly cannot be doubted but that they hold the legal title. No patent is issued direct to them by the President. The only evidence of title given them is the deed of the townsite trustees, in which the trustees are the grantors, and if the lot-owners hold the legal title, as counsel on the other side admit they do, it must pass to them by the deed of the trustees. But how can the trustees *convey* the legal title if they do not hold it? Section 2 of the act provides that "in the execution of such trust and for the purposes of *the conveyance of the title by said trustees*," certain certificates issued by provisional town authorities may be accepted as evidence of occupancy. Here Congress expressly recognizes the power of the trustees to convey *the title*, and this certainly means the *same title* that is mentioned in the part of section 6 above quoted, viz, "*the title of the United States*," which had been conveyed to them. It is a familiar rule that a grantor of real estate can convey no better or greater title than he holds and the rule applies to these trustees. If they, then, convey the legal title to lot occupants they must hold the legal title.

Lands belonging to the United States are not subject to taxation by the States or Territories in which they are located, but in Oklahoma undeeded lots in townsites are taxed.

Oklahoma *ex rel.*, Sampson *vs.* Clark *et al.*, 2 Okla., 82.

The McDaid case is not in conflict with the above view of the law. The only question before this Court in that case was whether the decision of the townsite trustees, in a controversy between adverse claimants to the same lot, was final, or whether the Secretary of the Interior had the power, under the act of May 14, 1890, to provide for appeal from such decisions to the Department. It was a question

of the jurisdiction of the Secretary to supervise control and direct the actions of subordinate officials or agents, in his own Department and appointed by himself, in the discharge of their duties under the law. Unless the law had expressly made their decisions final, it would be difficult to find a sound reason for declaring it so. This Court held that *the title* was conveyed to agents of the Government whose actions, in administering the trust created, should be under the supervision of the Secretary of the Interior; but this was not because of the general power residing in the Secretary to supervise and direct the disposal of the public lands. This land is no longer public land. It has been sold by the United States, the Government price has been paid into the Treasury. The meaning of the Court, it seems to us, ought to be clear enough from the language used in the second paragraph, on page 220 of the opinion, which is as follows:

"By the scheme of this Act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the Government until the rightful claimants and the undisposed of or surplus lands are ascertained. The Act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these Government appointees, and, until the trustees conveyed, the title did not pass beyond the control of the executive department *in that regard.*"

It is there said that *the title* is held by the townsite trustees in trust for the occupying claimants. In a qualified sense, it is also held for the Government. There can be no other parties in interest. The case, therefore, holds that for the benefit of all parties in interest *the title* is vested in these trustees, and this is precisely the rule as to the title in townsite entries made under the general townsite law. But when

we go a step farther and inquire into the procedure to be followed by the trustees in administering their trust and the supervision to be exercised over them for the purpose of correcting or preventing errors of judgment, we find a radical change made in the act of 1890, for Oklahoma, from the general law, in providing the machinery and the tribunals for these purposes. Instead of administering their trust under Territorial statutes, these boards are governed by regulations prescribed by the Interior Department, and instead of there being an appeal to the courts from the county judge or the municipal authorities, as the case may be, the appeal lies to the officials in the executive department. This is what the language used in the closing lines of the above paragraph means. It is there said that, *with regard to conflicting claims to lots*, "the title did not pass beyond the control of the executive department," until the trustees conveyed it away. But this is very far from saying what counsel contend that the court has said, viz, that the title remains *in the United States* until it is conveyed by the trustees. The meaning is that the title, in its course to occupants of lots, stops in the trustees until the rightful claimants are identified, and that, until deeds are made by the trustees, the title, although in them, is so far under the control of the Department as to enable it to pass upon contests over conflicting claims. But to the vast majority of these town lots there are no conflicting claims. As to these the conveyance of title upon the presentation of a claim is entirely between the claimant and the trustees. (See Secretary's Instructions of June 18, 1890, 10 Land Dec., 666, Sec. 10, at p. 669.) In these cases the Secretary exercises no direct authority and yet the legal title passes to the claimants. In the conveyances made by these trustees, they are the grantors. They do not assume to convey a title held by the United States but a title resting in themselves.

No other form of conveyance would be compatible with the language used in the patent issued to them by the officials of the Land Department. We print as an appendix to this brief a copy of the patent issued to these appellees in this case, and ask that its language be carefully considered. It will be seen that in the granting clause there is no reservation of any interest in the land for or by the United States. The form used is the precise form that is used in granting lands in trust for townsites to county judges and municipal authorities, elsewhere in the United States, and the legal effect is the same.

From all the foregoing considerations, it seems to us that the conclusion is irresistible that the supervisory power which rests in the Secretary of the Interior, over townsite trustees, arises from the subordinate relation of such trustees to himself and not from his general duties in relation to the public lands. The paragraph immediately following the one quoted, *supra*, from the McDaid case begins by speaking of "The regulation of the execution of the trust by the Secretary," and that describes his functions toward the townsite. He is no longer taking steps looking to the disposal of a parcel of the public domain. All those powers and functions were exhausted when he passed on and cancelled Payne's homestead entry, ordered an entry made by townsite trustees and patented the land to them in trust for the occupants of town lots. The legal title was then disposed of as against all possible adverse claimants, and then the right to go into a court of equity and have the legality of the proceedings determined accrued to a defeated claimant of the tract.

U. S. *vs.* Schurz (102 U. S., 378), cited by appellees, upholds a suit in mandamus against the Secretary of the Interior to compel the delivery of a patent and holds that title by patent from the United States is by record, and that when

the officers whose action is rendered by the laws necessary to vest the title in the claimant, have decided in his favor and the patent has been duly signed, sealed and countersigned and recorded (all of which was done in Payne's case), the title passes to him. Continuing, the Court says: "When by the action of these officers and of the President of the United States in issuing a patent to a citizen, the title to the land has passed from the Government, the question as to the real ownership is open in the courts to all the considerations appropriate to the case."

In the case at bar the Secretary and the President of the United States have settled the question in favor of an aggregation of individuals opposed to one man, and have so declared under seal and by patent. This one man brings suit against the trustees, the legal representatives of the aggregation, believing that the question as to the real ownership is open in the courts to all the considerations appropriate to the case.

Equity seeks to avoid a multiplicity of suits. If the defeated homestead claimant cannot sue the trustees, in a case of this kind, prior to the conveyance by them of all the lots, what a multitude of suits will be entailed upon him. He would have to sue each individual lot-owner, separately, and it might be years before all the lots were transferred from the board of trustees, so that he would be compelled to bring suit after suit as rapidly as deeds were issued. And then he would be confronted with the question as to how he should sue for the land covered by streets, alleys, parks, public buildings and the like? Unless the law is unquestionably that way, it ought not to be so construed as to produce such hardships and lay such obstacles in the way of a citizen who wishes to go into the courts to have his rights determined.

VI.

The Suit Has Not Abated.

It is contended in Mr. Hainer's brief (p. 8), that the appellees here are no longer in office; that "their successors have been appointed and qualified," and that these appellees are "not now proper parties defendant to this action." He cites Warner Valley Stock Co. *vs.* Smith (165 U. S., 28) and other cases, in support of his contention that this action has abated.

The objection here raised does not bring the case at bar within the case cited, as we believe a careful examination of that case and of the cases cited therein will demonstrate.

While the case of Stock Co. *vs.* Smith, *supra*, was, in form, a suit in equity to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from exercising jurisdiction over certain unpatented lands in Oregon, its main object, as declared on page 33 of the opinion of the Court was to compel the Secretary to issue patents for the lands to the State under the swamp grant. "The mandatory injunction prayed for was, in effect, equivalent to a writ of mandamus to him." Looking, therefore, at the real nature of the action, the Court applied to it the settled rule in mandamus proceedings against a public officer, to the effect that the proceeding abates upon his going out of office. The Boutwell case (17 Wall., 604) is declared the leading case on the question and the language used in that case is extensively quoted. It is quite apparent, therefore, that in the Smith case the rule is carried no further than in the Boutwell case and, indeed, the care taken, at the top of page 33 in the Smith case, to distinguish between the two cases of Co. Comers. *vs.* Sellew (99 U. S., 624) and Thompson *vs.* United States (103 U. S., 480) shows that the distinction is still fully recognized.

The reasons for declaring a suit for mandamus against a public officer abated upon the going out of office of the defendant are stated by Mr. Justice Strong in the Boutwell case and quoted in the Smith case as follows:

"The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. * * * If he be an officer and the duty be an official one, still the writ is aimed exclusively against him as a person and he can only be punished for disobedience. * * * Thus it is the personal default of the defendant that warrants impetration of the writ and if a peremptory mandamus is awarded the costs must fall upon the defendant."

To the above is added the suggestion that the Court cannot compel the performance of a duty after the power to perform has ceased; that if the successor could be substituted he might be mulcted in costs for no default of his own, that he, the successor, might perform the duty if requested, and, in any event, that the successor is not in privity, in regard to such duty, with the defendant.

The case at bar is an altogether different case. We are not asking mandamus. As we have shown all through this argument, we are not seeking to have the defendants directed or controlled in their official action or in the discharge of any duty in connection with their trust. The decree asked for by us would not operate upon the persons of the defendants but upon the title to the land held by them. Ours is not, therefore a personal action. We allege no default on the part of the defendants and charge them with no refusal to perform a duty.

Again, in the Boutwell and Smith cases, the defendants had no interest in the subject-matter of the suit. They were not sued in any representative capacity. Here, on the contrary, the defendants were the holders of the legal title,

representing the future claimants of lots and charged with a trust which passed, as to undeeded lots, to their successors, without formal conveyance, by the express language of the patent to them. (See Appendix) This patent, by the way, follows exactly the form of a patent on an ordinary pre-emption entry, with the important exception that instead of the words of grant being to the patentee " and his *heirs* and assigns " it is here to the patentees " and their *successors* and assigns."

Again, these defendants constitute what is, to all intents and purposes, a municipal board or qualified corporation, with continuing duties and powers which are not changed or suspended by a change in the personnel of the board. This is " Townsite Board No. 6." (Ex. B, p. 18 of Mr. Hainer's brief.) In the act of May 14, 1890, *supra*, these townsite tribunals are described as " *boards* of trustees." (See *proviso* to Sec. 1.) In the circular (10 Land Dec., 666) prescribing their duties they are required, in the second paragraph, to take an official oath; they are told, " Your several *boards* are, as required by the statute, composed of three trustees." In paragraph 16 (p. 671) provision is made for the designation of a chairman and secretary who acts, *ex officio*, as disbursing officer. They are to have a clerk (p. 17) and are to keep a permanent record of their proceedings (p. 18). The trust administered by any particular board is a continuing trust and whoever may be the successors of the present appellees, they are members of Townsite Board No. 6 for Oklahoma Territory and the duties, powers and trusts which were in these appellees, when this suit was begun, are now lodged in their successors.

But if these townsite boards are not, in legal contemplation, municipal boards, still the legal effect of their ceasing to be trustees and of their successors being appointed is simply to cause the transfer or assignment to their successors of the property in controversy, *pendente lite*.

Under such circumstances as are above detailed the suit does not abate. This would seem to be quite clear from an examination of the case of Thompson *vs.* United States (103 U. S., 480) cited and distinguished in the case of Stock Co. *vs.* Smith, *supra*. That was a suit for mandamus, too, but, although directed against an individual while holding the office of township clerk, it was held that the real object of the action was to bind the township as a municipal organization. In the course of his opinion, speaking for the Court, Mr. Justice Bradley said:

"And so, if we regard the substance and not the mere form of things, a proceeding like the present, instituted against a township clerk, as a step in the enforcement of a township duty to levy the amount of a judgment against it, ought not to abate by the expiration of the particular clerk's term of office, but ought to proceed to final judgment, so as to compel his successor in office to do the duty required of him, in order to obtain satisfaction from the township. The whole proceeding is really and in substance a proceeding against the township, as much as if it were named, and is in the nature and place of an execution. If the resignation of the officer should involve an abatement, we would always have the unseemly spectacle of constant resignations and reappointments to avoid the effect of the suit. Where the proceeding is in substance, as it is here, a proceeding against the corporation itself, there is no sense or reason in allowing it to abate by the change of individuals in the office."

In the case at bar we are not even seeking to enforce the performance of a duty by the appellees but to reach certain property the title to which had, as we think, been erroneously conveyed to them instead of to appellant. The reasons for holding that the action does not abate upon a change of the persons acting as trustees, the title having passed to their successors, are much stronger than in the

case quoted from. We refer, also, to the case of County Comrs. *vs.* Sellew (99 U. S., 624), *supra.*

Not only does this case come within the rule laid down in the Thompson case, *supra*, because of the nature of the board of townsite trustees, but it is also within the rule that an assignment or transfer of property which is the subject of litigation *pendente lite*, does not abate the action. In an action between private individuals, where the defendant transfers his interest, this is, of course, the recognized rule. The general rule is well stated and illustrated in S. and N. Ala. R. R. Co., *ex parte* (95 U. S., 221). Its application to cases where the subject-matter of the action is transferred by operation of law is shown in cases where a defendant was adjudged a bankrupt after suit was begun, and his property, including that in litigation, was transferred to his assignee. Such action does not abate. This is expressly held in Eyster *vs.* Gaff *et al.* (91 U. S., 521). That was a suit by the Gaffs to foreclose a mortgage during the pendency of which the defendant, one McClure, was adjudged a bankrupt, and an assignee was appointed, but was not made a party to the foreclosure proceedings. The mortgaged property was sold on decree and bought in by the Gaffs, who sued Eyster for possession. The contention was that all proceedings, after the assignment in bankruptcy, were void and the Gaffs took no title by their purchase, but this Court held otherwise, and, in discussing the questions involved, said :

"So in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the court. The obvious reason for this is, that if, when the jurisdiction of the court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to the litigation, and justice would be defeated by the number of these

transfers. Another reason is, that when such a suit is ended by a final decree transferring the title, that title relates back to the date of the instrument on which the suit is based, or to the commencement of the suit; and the court will not permit its judgment or decree to be rendered nugatory by intermediate conveyances.

"We see no reason why the same principle should not apply to the transfer made by bankruptcy proceeding."

See also Doe *vs.* Childress, 21 Wall., 642.

Another answer to the contention that the action has abated, under Stock Co. *vs.* Smith, *supra*, is found in the Oklahoma statutes. In the Boutwell case, as quoted in the Smith case, it was said that "in the absence of any statutory provision to the contrary," the writ must abate on the retirement of the defendant from office. But in the case at bar the interest we are seeking to reach in the hands of the appellees passed to their successors, and, in Oklahoma, provision is made against the abatement of an action in such cases.

The following section will be found in Oklahoma Compiled Laws, Ed. of 1893, page 738:

Sec. (3912) 40. "An action does not abate by the death or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action."

Our contention, then, is that this action has not abated by reason of the facts alleged in the brief of Mr. Hainer, because: 1st. Our action is, in fact, against a board of trustees, to reach property held by them in a representative capacity,

which goes to their successors by operation of law and the jurisdiction of the court having attached, is not divested by a change in the members of the board. 2nd. A change in the membership of the board operates, in law, simply as a transfer, *pendente lite*, of the subject-matter of the suit. 3rd. The local statute provides expressly that such an action shall not abate.

VII.

The Suggestion of Speculation.

Upon the merits of the case counsel come into this Court with an entirely new ground of disqualification against Payne. The case was argued and decided, in both the lower courts, exclusively upon the ground that Payne was a "sooner" and therefore disqualified. Here, very little is said on that proposition and that only in general terms. The entire energy of the gentlemen on the other side seems to be directed towards convincing the Court that even if the Territorial Supreme Court was in error in its view of the law, viz: That Payne's case is governed by Smith *vs.* Townsend, still, the conclusion of the Court should be sustained on other grounds and on grounds not presented to or passed upon by that court. We are inclined to take this as a tribute to the strength of our original brief on the merits of this case.

The attempt to raise this new ground of disqualification is made chiefly in Mr. Speed's reply brief. He assumes to set out the findings of fact made by the Secretary when Payne and other parties were before him in the contest against their homestead claims, but has utterly failed to observe the orderly sequence by which the Secretary took up and disposed of, in succession, the claims of six homestead claimants, in conflict with the townsite claim of East Guthrie, three of them, including Ransom *Payne's*, being for

the N. W. ¼ of Sec. 9, and three, including Veeder B. *Paine's*, being for the S. W. ¼ of Sec. 9. The facts as found by the Secretary on Payne's claim are set forth in his decision in 12 Land Dec., 654, last two lines, and the first paragraph on page 655. The rest of page 655, and first paragraph on page 656, are devoted to a discussion of the law of Payne's case and to conclusions drawn from the facts, but the Secretary expressly found (page 655, first paragraph), that "so far as age citizenship, etc., are concerned, he (Payne) was a qualified homestead claimant." Mr. Speed, by inadvertence, of course, refers to a statement on page 657 by the Secretary as referring to *Payne*, when, in fact, it refers to *Paine*. Mr. Speed says the Secretary found, "that this land was needed for townsite purposes and that *Payne* knew all these facts." What the Secretary said was: "*Veeder B. Paine* knew all these facts." (See last line, 5th paragraph, p. 657.) Owing to this oversight on Mr. Speed's part, it is scarcely necessary to pursue the proposition farther. No such ground of contest as is here suggested was raised before the Secretary, in the contest proceedings, against Payne or Paine or anyone else. It did not enter into the finding of facts by the Secretary as to Payne. It was not even suggested to either of the lower courts in the present action.

But this Court will certainly be slow to announce, as a conclusion of law, that a man, otherwise qualified, is disqualified as a homesteader if he seeks a vacant claim near or contiguous to a town or city, on the theory that such selection is *per se* evidence of bad faith. It is a most pernicious doctrine and utterly ignores the rule that fraud is never presumed but must be affirmatively proven. The expressions used by the Secretary in the case of Guthrie Townsite *vs.* Paine *et al.*, 12 L. D., 653, were not intended to be taken as adopting any such general proposition of law. In the case of Bennett *vs.* Cravens, 12 L. D., 647, de-

cided the same day, the same Secretary found in favor of Cravens who, he says (p. 652), "could not fail to be convinced that land immediately adjoining a growing town would soon become valuable." And yet Cravens was not disqualified.

But this question is not in the record, and we pursue it no farther,

Respectfully submitted,

HENRY N. COPP,
S. D. LUCKETT,
Attorneys for Appellant.

APPENDIX.

[*Copy of Patent.*]

UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Certificate No. 809.

Whereas John Foster, William S. Robertson and Andrew C. Schnell, Trustees of the Townsite Board, Number Six, of the Townsite of East Guthrie, in Logan County, Oklahoma Territory, in trust for the several use and benefit of the occupants of the Townsite of East Guthrie, in said county and territory, according to their respective interests, have deposited in the General Land Office of the United States, a certificate of the Register of the Land Office at Guthrie, Oklahoma Territory, Whereby it appears that full payment has been made by the said John Foster, William S. Robertson and Andrew C. Schnell, Trustees as aforesaid, in trust as aforesaid according the provisions of the Act of Congress, of the 24th of April, 1820, entitled "an act making further provision for the sale of public Lands" and the acts supplemental thereto including the Act of May 14th, 1890, for the West half of Section Nine, in Township Sixteen, North of Range Two West of Indian Meridian, in Oklahoma Territory, containing three hundred and twenty acres, according to the official plat of the survey of said land returned to the General Land Office by the surveyor General, which said tract has been purchased by the Said John Foster William S. Robertson and Andrew C. Schnell, Trustees, As aforesaid, in trust as aforesaid, Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, Have given, and granted, and by these presents do give and grant unto the said John Foster, William S. Robertson and Andrew C. Schnell, trustees as

aforesaid, in trust as aforesaid, and to their successors, the said tract above described, to have and to hold the same, together with all the rights privileges immunities and appurtenances of whatsoever nature thereunto belonging, unto the said John Foster, William S. Robertson, and Andrew C. Schnell, trustees as aforesaid, in trust as aforesaid and to their successors and assigns in trust as aforesaid.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to affixed thereto.

Given under my hand at the City of Washington, the twenty-sixth day of January, in the year of Our Lord, (1892) Eighteen Hundred and Ninety-two and of the Independence of the United States the One Hundred and Sixteenth (116)

By the President:

BENJAMIN HARRISON,
By M. McKEAN, *Secretary.*

D. P. ROBERTS,
Recorder of the Gen'l Land Office.